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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959.

No. 755.

WALTER K. RIEDEL,
Petitioner,

vs.

ATLAS VAN LINES, INC. and KNOWLES STORAGE & MOVING COMPANY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Walter K. Riedel, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on December 30, 1959, the enforcement of which was stayed February 2, 1960, by an order staying the issuance of the mandate.

OPINIONS BELOW.

The opinions of the United States District Court for the Western District of Missouri, Southwestern Division, dated May 7, 1959, is not reported but is set out in the printed record on pages 27 and 28. On December 30, 1959, the United States Court of Appeals for the Eighth Circuit filed an opinion reported in 272 F.2d 901, affirming the judgment of the District Court. Appellant's petition for rehearing was denied January 27, 1960; it is not reported but appears in the certified transcript attached to the record. An order staying the issuance of the mandate was entered February 2, 1960, and appears in the transcript attached to the record below.

JURISDICTIONAL STATEMENT.

The judgment sought to be reviewed herein was dated and entered December 30, 1959. A petition for rehearing was filed by petitioner and the court below entered an order dated January 27, 1960, denying the petition for rehearing. On February 2, 1960, the court below stayed its mandate for a period of thirty days for the purpose of permitting the filing of this petition for writ of certiorari.

Jurisdiction is conferred in this court by Title 28, U.S.C., Section 1254.

QUESTION PRESENTED.

Only one question of law is involved in this case:

Is a servant, employed to drive a motor vehicle, acting within the scope of his employment when he drives a borrowed automobile to obtain a part for his disabled trailer-truck?

STATEMENT OF THE CASE.

The plaintiff, Walter K. Riedel, was horribly and permanently injured when his vehicle was struck head-on by an automobile driven by James Harris (R. 2), in Vernon County, Missouri.

The defendants were (1) James Harris, the driver of the vehicle (herein called "Harris"); (2) Knowles Storage and Moving Company, a corporation (herein called "Knowles"), the employer of Harris at the time of the collision; and (3) Atlas Van Lines, Inc., a corporation (herein called "Atlas"), the lessee of a Knowles truck hauling furniture which Harris drove and which broke down in Vernon County, Missouri (R. 1), in March of 1958.

The facts are not in dispute except as to minor details. Knowles owned certain trucks. Knowles entered into a lease agreement with Atlas whereby Atlas rented these Knowles trucks (R. 11). A Knowles driver was furnished with each truck. This driver remained on the Knowles payroll. The lease agreement appears in the Record and its pertinent provisions are as follows (R. 11):

1. Atlas paid rental to Knowles for the use of each truck based upon a certain amount for each mile Atlas used the truck in hauling merchandise (R. 12.)

2. Atlas was required to use the truck exclusively in the business and service of Atlas (paragraph (b) of Lease).

3. Atlas had authority from the Interstate Commerce Commission to travel over certain routes and the equipment was to be used solely in compliance with I.C.C. rules and tariffs (paragraphs (b) and (d) of Lease).

4. Knowles maintained the vehicle, at its cost, in good condition of repair and service (paragraph (c) of Lease).

5. Knowles paid all expenses of operation including wages of the driver, taxes, repairs and other costs (paragraph (c) of the Lease).

6. Knowles agreed to indemnify and hold Atlas harmless from "any loss or damage resulting from the negligence of * * * operating personnel."

7. Knowles agreed to obtain public liability insurance with endorsements in favor of Atlas (paragraph (i) of Lease).

8. Atlas agreed that the vehicle would be operated solely and exclusively under the direction and control of Atlas.

Harris, a Knowles employee, was driving the Knowles truck near Rich Hill, Missouri (R. 21). The truck had written on the side the names of Knowles and Atlas (R. 22). There was a load of furniture on the truck (R. 22), which was being hauled for an army officer under Atlas I.C.C. authority.

Harris was an hourly employee, paid by Knowles. When his truck breaks down, he receives "lay-over" time. That is, he receives eight hours' pay for six days while waiting and then the seventh day Knowles does not pay him, but then his lay-over time continues again the eighth and successive days (R. 22).

Harris was in sole charge of the truck. In case of a breakdown, he was to have the truck repaired and get the money from his employer, Knowles. Harris had authority to order the repairs (R. 22).

The engine on the truck "went out" near Rich Hill, Missouri (R. 22). Harris drove the truck into the Tracy Brothers garage at Rich Hill.

Tracy, the garage man, examined the truck and found that it need a new shortblock (R. 20). Harris called McGuire, a Knowles executive, who approved the purchase of the new shortblock (R. 23). Tracy and Harris then drove in Tracy's pickup truck to Kansas City to obtain the new shortblock (R. 20). They bought the new shortblock in Kansas City and drove back to Rich Hill (R. 20).

The next day, which was the day of the collision, Tracy started to put the shortblock in the engine. He found that a valve seat in the head of the engine was loose (R. 20). There was no equipment in Rich Hill to repair the valve seat. Nevada, Missouri, was 14 miles away. The valve seat could be repaired there (R. 21).

Tracy testified that Harris was in a hurry to get the truck on the road because of the load of furniture belonging to the army officer in the truck (R. 13). Tracy testified that he told Harris that it would take longer to get the truck repaired if one of the mechanics had to go to Nevada for the repair of the valve seat in the head. Tracy testified on direct examination that Harris suggested he use Tracy's car to go to Nevada with the head of the engine for the repair of the valve seat. On the cross-examination Tracy testified that the suggestion was Tracy's (R. 21).

Harris testified that the trip in Tracy's car was made at Tracy's suggestion (R. 22). Tracy did not pay him or promise to pay him anything. While he was in Rich Hill he was receiving lay-over time. The longer he stayed in Rich Hill the more money Knowles would owe to him. Tracy was to receive the same amount for repair of the truck whether it got out Sunday or Monday (R. 22). Harris admitted that he was anxious to get his truck repaired and back on the road (R. 22). Harris admitted that he was in sole charge of the truck and that in case of break-down,

he was to get the truck repaired (R. 22). In any event, Harris, with Tracy's permission, took Tracy's car to drive the 14 miles to Nevada to have the valve seat in the head of the engine repaired. Knowles did not know that Harris was using Tracy's car to hurry the repairs. Knowles had never authorized Harris to borrow Tracy's car (R. 23).

McGuire, the Knowles' vice president, testified that the more tonnage hauled by Atlas, the more Knowles receives in compensation (R. 23). Harris was on the Knowles payroll at the minute of the collision, receiving "lay-over" time. While the truck was idle, Knowles nevertheless had to pay the driver this lay-over time (R. 23). He told Harris "to see that the job was done" (R. 23). McGuire knew nothing about the Harris trip from Rich Hill to Nevada.

McGuire, in an affidavit filed in support of the Atlas motion for summary judgment, stated that (R. 17): "he, McGuire, had supervision over the maintenance and repairs to said leased tractor."

While returning from Nevada to Rich Hill in the Tracy car carrying the head of the Knowles engine, Harris injured the plaintiff. Tracy saw his car as it left his garage and the next time he saw it was at the scene of the collision (R. 21).

The trial court ruled that neither Knowles nor Atlas was liable to the plaintiff. The trial court, on the day of and before the beginning of the trial, sustained a motion for summary judgment in favor of Atlas (R. 27), and at the close of all of the case sustained a motion for a directed verdict in favor of Knowles (R. 27).

The case against Harris alone was submitted to a federal jury in Joplin, Missouri, who returned a verdict in favor of plaintiff and against Harris for $85,000 (R. 28).

The plaintiff appealed from the action of the trial court in (a) sustaining a motion for a directed verdict and entering judgment in favor of Knowles, and (b) entering summary judgment in favor of Atlas and against the plaintiff (R. 29).

The issues, therefore, are:

1. Is Knowles liable to plaintiff by reason of the negligence of its employee, Harris?

2. Is Atlas liable to plaintiff by reason of the negligence of Harris?

3. Does the fact that Harris was using the Tracy car to speed the repair of the truck and the delivery of the merchandise relieve Knowles and Atlas from liability?

REASONS FOR GRANTING THE WRIT.

The trial court held that the servant, Harris, was not acting within the scope of his employment when he borrowed a passenger automobile in order to drive to a garage where he could obtain a part for his broken-down truck, and consequently, that his master would not be liable for injuries inflicted upon another (the plaintiff) while Harris was driving the borrowed automobile. This judgment was affirmed by the Court of Appeals and a rehearing on this point of law was denied.

Admittedly, the Federal Courts must look to Missouri law for the answer of this question. But the question has not been answered in Missouri. Cases apparently similar in facts and law have been decided, but they are not in point. It is on these cases that the Court of Appeals based its decision. And since no cases are reported in Missouri on the direct issue of law presented herein, petitioner urges that the Court of Appeals should have examined the gen-

eral law of agency, The Restatement, and cases from the jurisdictions where the question has been answered. As is evident from the opinion the court below did not rest its decision on anything but Missouri cases, which petitioner urges are inapplicable on their facts. For this reason petitioner submits that a writ of certiorari should issue in order that his cases and general principles of law can comprehensively be reviewed.

The agency question has been and still is the only actively disputed issue in the litigation. This question alone is the crux of the suit and since it is the only question involved, it is imperative that it be given the closest possible scrutiny. Here is the essence of the problem. The appellees in their brief to the Court of Appeals cited six Missouri cases supporting the thesis that Harris was not acting within the scope of his employment at the time the collision occurred. Of these six cases the Court of Appeals cited four as authority for their decision. In none of the four cases was the servant-tortfeasor authorized to drive any motor vehicle by his master. Herein lies the discrepancy between the law and the facts. Petitioner urges that those cases cited by the Court of Appeals are inapplicable to the instant case as the servant herein (Harris) was authorized and employed principally to operate a motor vehicle—a semi-trailer truck. When he drove another vehicle —a 1958 DeSoto—to get a part for his broken-down trailer, he was still doing the *same kind of act* for which he was employed. He subjected his master to no greater risk because he was driving a motor vehicle which had been substituted by necessity for his truck. In the Missouri cases cited by the Court of Appeals the master's risk was greatly increased because the servants operated motor vehicles when they were not authorized or employed to do that.

The four Missouri cases cited by the Court of Appeals as authority for its decision are *Oganaso* v. *Mellow*, 356 Mo. 228, 201 S.W.2d 365; *Farber* v. *Missouri Pac. Ry. Co.*, 32 Mo. App. 378, affirmed 116 Mo. 81, 22 S.W. 631, 20 L.R.A. 350; *McCaughen* v. *Missouri Pac. Ry. Co.*, Mo. App., 274 S.W. 97 and *Montana* v. *Nenert*, Mo. App., 226 S.W.2d 394. In the *Oganaso* case the employee used a car when he was not hired to use one and injury resulted to an independent contractor working on defendant-employer's property. The court denied the liability of the employer. In the *Farber* case no mention of an automobile appears in the case at all. In that case a railroad brakeman forcibly ejected plaintiff from defendant's train. There was no evidence tending to show that the *duties* of the brakeman included the act done by plaintiff. In the *McCaughen* case the employee was hired to do his job on foot or in a streetcar, not an automobile. While using an automobile he injured plaintiff. The court said the master was not liable. And in the *Montana* case the employee was instructed to set up and prepare a garage for business, not drive an automobile. Here again the court held that the master was not liable. It should be noted that in each of these cases the employee did an act that he was not hired or authorized to do, and the act which resulted in injury to another was one which materially increased the master's risk. In the instant case Harris was operating a motor vehicle when he committed a negligent act. But the risk the master ran while Harris was driving a passenger automobile was no greater than if the same collision had occurred while he was driving a semi-trailer truck, which he was expressly hired to do.

The classic case cited by petitioner to the Court of Appeals is *Rankin* v. *Western Union Telegraph Co.*, 147 Neb. 411, 23 N.W.2d 676. In that case a delivery boy who was the servant had two bicycles, one a regular bicycle and the

other a racing bicycle. He had been instructed not to use the racing bicycle in his errands for the company. He was given a message to deliver, used the racing bicycle and struck and injured the plaintiff. Judgment for the plaintiff against the master was affirmed. The Restatement of Agency (Section 239) was cited with approval in the decision, which held there was no substantial increase of risk to the master, and that the difference between the two bicycles was slight.

An even closer case cited below by petitioner is *Radoccia v. Goodrich Oil Co.*, 63 R.I. 58, 6 A.2d 746. In that case the employee of the oil company injured the plaintiffs. The employee had been using the oil company truck to make deliveries. There was another delivery to be made but it was evening and the lights on the truck would not work. The employee then borrowed his father's car which the employee had used to go to and from work. While making the delivery in his father's car and while on his way home, the employee had the accident in suit. The court upheld the verdict for the plaintiffs against the employer.

A case which goes much further than the rule here applied is *Leary* v. *Department of Labor and Industries*, 18 Wash. 2d Series 532, 140 P.2d 292. In that case Leary was employed as a gateman at Associated Builders. His duties required him to check passes, open the gate and admit traffic and keep the gate clear. The gate became blocked by an automobile of a fellow employee. Leary went out to his own private car and, while he was driving his own car back of the fellow employee's car so he could push it, he had a heart attack from which he died. The court held that the deceased was in the course of his employment at the time of his death.

CONCLUSION

Since the court below apparently overlooked the point of law concerning the increased risk element when applied to the facts, as is indicated by its opinion, petitioner submits that these inapplicable Missouri cases be thoroughly reviewed and that the petitioner's authorities be closely studied. For the reason outlined above, petitioner prays that a Writ of Certiorari be issued to the United States Court of Appeals for The Eighth Circuit.

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